(2)

No. 04-973

Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JESSICA RODRIGUEZ-FREYTAS,

Petitioner,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

RICHARD SCHOOLMAN
Counsel of Record for Respondent
Office of Martin B. Schnabel,
General Counsel
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, NY 11201
Tel. [718] 694-4667

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When the parties to an action seeking compensatory, injunctive, and declaratory relief brought under statutes providing a reasonable attorney's fee to a "prevailing party" reach a settlement involving plaintiff's stipulating to dismiss the action with prejudice and defendant's agreeing only to pay plaintiff a specified sum of money, and the settlement's terms are *not* made part of any court-ordered consent decree (or incorporated in any signed order of dismissal) and the district court has no retained jurisdiction to enforce the settlement's terms, was the Second Circuit correct in holding that, in light of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), plaintiff is not a "prevailing party" and thus not statutorily entitled to an award of attorney's fees?

2. Where negotiation of such a settlement is facilitated by a magistrate judge who was familiar with the case but lacked any decretal power in that case, was the Second Circuit correct in rejecting *sub silentio* the argument that such involvement by a magistrate judge constituted sufficient "judicial imprimatur" (under *Buckhannon*) to make the settling plaintiff a "prevailing party" (even though the settlement's terms were never made part of any court-ordered consent decree or incorporated in any signed order of dismissal, and the district court retained no jurisdiction to enforce the settlement's terms)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
BRIEF IN OPPOSITION	1
OPINIONS BELOW	1
COUNTER-STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	5
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Alegria v. District of Columbia, 391 F.3d 262 (D.C. Cir. 2004) 6

Barrios v. California Interscholastic Federation, 277 F.3d 1128 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002) 7

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001) ..... *passim*

Christina A. v. Bloomberg, 315 F.3d 990 (8th Cir. 2003) 6

Doe v. Boston Public Schools, 358 F.3d 20 (1st Cir. 2004) 6, 7

Petersen v. Gibson, 372 F.3d 862 (7th Cir. 2004) 6

Smalbein v. City of Daytona Beach, 353 F.3d 901 (11th Cir. 2003) 6

Smyth v. Rivero, 282 F.3d 268 (4th Cir.), *cert. denied*, 537 U.S. 825 (2002) 6

Toms v. Taft, 338 F.3d 519 (6th Cir. 2003) 6, 8

STATUTES

28 U.S.C. § 2106 5

42 U.S.C. § 1983 ..... 1, 2

42 U.S.C. § 1988 2

42 U.S.C. § 2000e 1, 2

Fed. R. Civ. P. 40(a)(1)(ii) 2

2d Cir. R. § 0.23 5

BRIEF IN OPPOSITION

Respondent, the New York City Transit Authority ("Transit Authority"), requests that the Court deny the petition for a writ of certiorari submitted by the petitioner, Jessica Rodriguez-Freytes, seeking review of a portion of the summary order of the United States Court of Appeals for the Second Circuit in this case. (If the Court grants the petition, the Transit Authority requests that the Court also grant the Transit Authority's separately filed conditional cross-petition for a writ of certiorari seeking review of another portion of that summary order.)

OPINIONS BELOW

The summary order of the Second Circuit Court of Appeals, as printed in the Appendix to the petitioner's petition and as unofficially reported at 96 Fed.Appx. 392 (2d Cir. 2004), is materially inaccurate. That summary order, with all of the language of that order as actually provided to the parties by the Office of the Clerk of the Second Circuit Court of Appeals (which order was not thereafter amended or corrected), is printed in the Appendix to this brief in opposition.

COUNTER-STATEMENT OF THE CASE

This civil case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1983, was settled, in a common way, by a voluntary agreement between the parties, both represented by lawyers. The terms of that settlement were not incorporated into any court-ordered consent decree (or even

incorporated in any order of dismissal) and the district court retained no jurisdiction to enforce the settlement's terms. Those terms were, essentially (i) that the plaintiff Jessica Rodriguez-Freytes[1] would sign a stipulation of dismissal of her case with prejudice and (ii) the defendant New York City Transit Authority would then pay the plaintiff a stated sum of money. When the stipulation of dismissal was filed in February 2001 (the dismissal became effective, under Fed. R. Civ. P. 40(a)(1)(ii), upon that filing), plaintiff applied to the district court for attorney's fees. Plaintiff's theory was that, by virtue of her getting through the settlement *some* of the relief prayed for in her original complaint (she had asked for $1,000,000 in compensatory damages as well as injunctive and declaratory relief, but settled for $41,518.60 without any injunctive or declaratory relief), she was, under the statutory provisions relevant to attorney's fees in Title VII actions and actions under 42 U.S.C. § 1983 (*i.e.*, 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988, respectively), a "prevailing party" and thus eligible for an award of reasonable attorney's fees.

While that application was pending, however, this Court issued its opinion in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). At the very beginning of that opinion, the Court stated:

> Numerous federal statutes [including those applicable to actions under Title VII and 42 U.S.C. § 1983] allow courts to award attorney's fees and costs to the "prevailing party." The question

[1] In the caption and in some places in the text of the Second Circuit's summary order, her last name is apparently misspelled as Rodriguez-Freytas.

> presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendants' conduct. We hold that it does not.

532 U.S. at 600. In light of that holding (and other language in the Court's *Buckhannon* opinion that noted that settlement agreements, unless incorporated into court-ordered consent decrees, lack the kind of judicial imprimatur sufficient to make the settling plaintiffs into prevailing parties), the Transit Authority urged the district court, under *Buckhannon*, to determine that Ms. Rodriguez-Freytes was not a "prevailing party" because the settlement's terms were not made part of any court-ordered consent decree or equivalent document giving the district court retained jurisdiction to enforce the settlement's terms in the future (and there obviously had been no judgment on the merits), and thus to deny the application for attorney's fees.

The district court (Gleeson, J.) ultimately rejected the applicability of *Buckhannon*, concluding that *Buckhannon* did not apply to actions "for money damages" (Petitioner's Appendix at App. 7).[2] The district court also concluded (assuming *Buckhannon* applied) that, because the terms of the settlement had been worked out with the assistance of a magistrate judge familiar with the case, that "level of judicial involvement" – notwithstanding that the magistrate judge never had *any* decretal power in that case –

---

[2] The district court overlooked the fact that the complaint in this case sought not only money damages but also declaratory and injunctive relief concerning the functioning of the Transit Authority's "restricted duty" policies as applied to pregnant women.

was sufficient to create "judicial imprimatur" on the settlement, making plaintiff a "prevailing party." *Id.* Judge Gleeson then awarded plaintiff attorney's fees in an order dated October 15, 2001. *Id.* (The amount of those fees was $14,712.50, which amount had been recommended by the magistrate judge in her report to Judge Gleeson concerning the application for attorney's fees.) The Transit Authority appealed from that order to the extent the order determined, notwithstanding *Buckhannon*, that plaintiff was entitled to reasonable attorney's fees.

In a summary order issued on April 27, 2004, the Court of Appeals for the Second Circuit vacated the district court's order awarding plaintiff attorney's fees because "[t]he instant case was . . . settled by an agreement negotiated by the parties" with "'[t]he district court never [having] granted [plaintiff] any relief on the merits," and "nor did 'the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement.'" Transit Authority Appendix at A. 4. Thus, the Court of Appeals continued, "[a]ccording to *Buckhannon*, [plaintiff] cannot be considered a prevailing party, and is therefore not entitled to attorney's fees." *Id.* The Court of Appeals, in this respect, was clearly correct. We see nothing in *Buckhannon*, or in logic, that would support either the notion that *Buckhannon*'s view of "prevailing party" does not apply to cases in which a plaintiff sought, along with injunctive and declaratory relief, money damages (or settled only for money). And we see nothing in *Buckhannon*, or in logic, that would support the notion that, where a *voluntary* settlement between the parties is negotiated with the help of a magistrate judge (or an Article III district judge) but not then embodied in a consent decree or comparable order that the district court

would retain jurisdiction to enforce, such a (free-standing) *voluntary* settlement should be treated as if it were a *court-ordered* consent decree.[3]

REASONS WHY THE PETITION SHOULD BE DENIED

Ms. Rodriguez-Freytes's petition should be denied for several reasons. To begin with, the summary order that petitioner seeks review of in this Court is, under the Second Circuit's Rule (§ 0.23) concerning its summary orders,[4] and as the Second Circuit in fact wrote in capitalized bold print at the top of the summary order in this case (Transit Authority Appendix at A. 1), an order that "may not be

[3] The Court of Appeals, after vacating the order awarding attorney's fees, remanded to the district court so that – "[i]n the interests of fairness, and pursuant to 28 U.S.C. § 2106" – the plaintiff could choose to "cancel the settlement agreement and proceed toward an adjudication on the merits" because she had had a "reasonable . . . belie[f]," when she (through counsel) made the settlement agreement, that she would be entitled to attorney's fees as a prevailing party," and that belief turned out to be mistaken. Transit Authority Appendix at A. 5. In this respect, the Court of Appeals' summary order is worthy of review by this Court; such review is cross-petitioned for in the separately filed conditional cross-petition for a writ of certiorari being submitted by the Transit Authority.

[4] The Second Circuit's local Rule § 0.23 reads in relevant part as follows:

> Where disposition [of an appeal] is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, *they shall not be cited or otherwise used in unrelated cases before this or any other court.*

(Emphasis added.)

cited as precedential authority to this or any other court" (except "in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.") Petitioner does not explain why an *expressly* non-precedential decision merits further review by this Court to help resolve a split among the circuit courts.

Second, the Second Circuit's interpretation or application of *Buckhannon* as expressed in this case is not merely shared by one other court of appeals (as the petition suggests) but by every court of appeals (except the Ninth Circuit) that has addressed the matter of whether a voluntary settlement of litigation (without the settlement's terms becoming, or becoming the functional equivalent of, a court-ordered consent decree) can make the plaintiff a "prevailing party" for attorney's fee purposes. *See*, in addition to the Seventh Circuit's decision in *Petersen v. Gibson*, 372 F.3d 862 (7th Cir. 2004), which is cited in the petition, the decisions in *Alegria v. District of Columbia*, 391 F.3d 262 (D.C. Cir. 2004); *Doe v. Boston Public Schools*, 358 F.3d 20 (1st Cir. 2004); *Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003); *Toms v. Taft*, 338 F.3d 519 (6th Cir. 2003); *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003); and *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002). We recognize that the Ninth Circuit seems to have accepted the notion that a settling plaintiff is still a "prevailing party" (for attorney's fees purposes) on the theory that pre-*Buckhannon* precedent (in that Circuit) as to settlements has not been affected by *Buckhannon* because (except to the extent *Buckhannon* concluded that a plaintiff that benefits from a defendant's voluntary legislative change of the laws or regulations that the plaintiff had sued to change is not a prevailing party) *Buckhannon*'s holdings – some of which

are set out at the beginning of the *Buckhannon* opinion, and quoted above – are really just "dicta," *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n. 5 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002). We doubt that any court, other than this Court, may decide that what this Court calls a "hold[ing]" is not a holding but only "dicta." In any event, the Ninth Circuit's minority of one view has been often criticized (for instance, in *Doe*, 358 F.3d at 25) and should ultimately be corrected; but if the Ninth Circuit does not itself act to end its divergence from the views of the other courts of appeals, this Court might appropriately wait until a citable, precedential decision in direct conflict with *Barrios* reaches this Court.

Third, there is nothing in the language or the logic of *Buckhannon* that would exempt from its definition of, and holding concerning what is required to be, a "prevailing party" in fee-shifting statutes such as the statutes at issue in this case those lawsuits that seek monetary relief, let alone – as here – actions seeking monetary relief, and injunctive relief, and declaratory relief. As far as we are aware, in no case (except in the district court in this litigation) has the notion that such cases should be exempt from *Buckhannon* been accepted. And petitioner's argument that a settlement that requires a defendant merely to pay money would not need, or could not benefit from, a district court's retaining jurisdiction (through a court-ordered consent decree or equivalent order) to enforce such payment obligation is close to incomprehensible. In this case, in fact, the Transit Authority paid Ms. Rodriguez-Freytes the agreed upon sum some eight weeks *after* the stipulation of dismissal with prejudice (a stipulation that did not incorporate the settlement's terms or otherwise give the district court retained jurisdiction to enforce those

terms) had been filed. *If* the Transit Authority had, for some reason, declined to pay, surely having a district court judge with retained jurisdiction available to use the contempt powers of the court to compel payment would have been very useful for plaintiff, who otherwise would have had to commence a new action (and probably in state court for lack of diversity between the parties) for breach of contract, that is, breach of the settlement agreement. Such retained jurisdiction arises through a court-ordered consent decree, but there was no such document in this case.

Finally, there is no authority for the view (outside of the district court's order in this case) that a magistrate judge's – or an Article III district judge's – being helpful in facilitating a voluntary settlement, or recommending a particular settlement that the parties then voluntarily accept, is a kind of "judicial imprimatur" on the settlement that is comparable to the kind of "judicial imprimatur" that the Court in *Buckhannon* deemed necessary to make a plaintiff a "prevailing party," that is, comparable to a district court's ordering a consent decree. This view was not only rejected by the Second Circuit in this case, albeit *sub silentio*, but expressly rejected by the Sixth Circuit in *Toms v. Taft*, 338 F.3d at 529. This view, if adopted, would also discourage defendants from even participating in settlement discussions with magistrate judges or Article III district judges (*i.e.*, with judicial officers who might well be very helpful in moving the parties towards settlement), a result that could have disastrous effects on the district courts' ability to control their dockets through, among other means, voluntary settlements.

CONCLUSION

The writ of certiorari sought by petitioner in this case should be denied.

Dated: Brooklyn, New York
February 17, 2005

Respectfully submitted,

RICHARD SCHOOLMAN
Counsel of Record for Respondent
Office of Martin B. Schnabel,
General Counsel
NEW YORK CITY TRANSIT AUTHORITY
130 Livingston Street
Brooklyn, NY 11201
Tel. [718] 694-4667

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the day of two thousand and four.

Present: THOMAS J. MESKILL,
JON O. NEWMAN,
ROSEMARY S. POOLER,

Circuit Judges.

JESSICA RODRIGUEZ-FREYTAS,

Plaintiff-Appellee,

-v- (01-9443)

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

(Filed Apr. 27, 2004)

Appearing for Appellee: Leon Friedman, New York, NY.

Appearing for Appellant: Richard Schoolman, New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Gleeson, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED AND REMANDED.**

We are asked on this appeal to review a judicial award of attorney's fees in the context of a civil rights action that was discontinued pursuant to a settlement agreement.

Plaintiff-appellant Jessica Rodriguez-Freytes commenced this action on August 18, 1999, by filing a complaint in the U.S. District Court for the Eastern District of New York. In her complaint, she alleged that the New York City Transit Authority ("NYCTA"), which employed her as a train operator, "ha[d] implemented a custom, policy and practice of removing pregnant train operators from active work shortly after learning that the individual is pregnant and despite the fact that the pregnant individual is not disabled, all of which is done because such train operators are pregnant. Similarly situated non-pregnant train operators are permitted to continue working." The complaint alleges that this amounts to discrimination in violation of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

The parties eventually negotiated a settlement pursuant to which NYCTA would pay Ms. Rodriguez-Freytes back pay in the amount of $16,518.60, and damages for emotional distress in the amount of $25,000.00, for a total of $41,518.60. Judge Gleeson subsequently issued a "Settlement and Order of Dismissal," which acknowledged the settlement agreement and dismissed the action subject

to Ms. Rodriguez-Freytas's reservation of the right to apply for attorney's fees.

Ms. Rodriguez-Freytes subsequently moved for an award of attorney's fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k). In a Report and Recommendation, dated September 14, 2001, Magistrate Judge Azrack found that an award in the amount of $14,712.50 was appropriate. This figure was approved by Judge Gleeson in an Order, dated October 15, 2001 ("the October 15th Order").

Numerous federal statutes, including § 1988 and § 2000e-5(k), allow courts to award attorney's fees and costs to the "prevailing party." In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598 (2001), which was decided shortly before the October 15th Order was issued, the Supreme Court considered whether what is commonly known as "the catalyst theory" may serve as a basis for attorney's fees pursuant to these statutes. The catalyst theory asserts that a plaintiff may be considered a prevailing party in a case in which the defendant's voluntary action moots the lawsuit by providing the relief sought by the plaintiff.

The Supreme Court held that the catalyst theory may not serve as a basis of an award of attorney's fees because the phrase "prevailing party" does not "authorize[] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit," achieves a desired result "without obtaining any judicial relief." 532 U.S. at 606. Judicial relief is relief that amounts to a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. Thus, "[a] defendant's voluntary change in conduct,

although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

In *Buckhannon,* the voluntary action which mooted the lawsuit was the defendant State's unilateral decision to repeal the regulations being challenged in the suit. *Buckhannon,* however, has been read by our Circuit to be applicable to situations in which a lawsuit is mooted by bilateral voluntary action, such as the conclusion of a settlement agreement among the parties which disposes of all issues raised by the suit. Thus, *Union of Needletrades, Industrial and Textile Employees v. INS,* 336 F.3d 200, 206 (2d Cir. 2003), involved a situation in which the parties "jointly reported [to the court] that they had 'settled all of the substantive issues in the case.'" We held that even though the plaintiff "may have accomplished the objective it sought to achieve by initiating" the lawsuit, "its failure to secure either a judgment on the merits or a court-ordered consent decree renders it ineligible for an award of attorney's fees under *Buckhannon.*" *Id.*

The instant case was also settled by an agreement negotiated by the parties. Although Ms. Rodriguez-Freytas received a monetary award pursuant to that settlement, it is uncontested that, as in *Needletrades,* "[t]he district court never granted [her] any relief on the merits," nor did "the district court order a consent decree or endorse, or retain jurisdiction over, [the] settlement agreement." 336 F.3d at 206. According to *Buckhannon,* she cannot be considered a prevailing party, and is therefore not entitled to attorney's fees.

We therefore vacate the October 15th Order. We are, however, sensitive to the fact that the settlement agreement

in this case was negotiated pre-*Buckhannon*, when it would have been reasonable for Ms. Rodriguez-Freytas to believe that she was entitled to an award of attorney's fees. In the interests of fairness, and pursuant to 28 U.S.C. § 2106, we therefore remand this action to the district court with instructions that it afford the parties an opportunity to re-negotiate the settlement agreement in the form of a consent decree over which the district court would retain jurisdiction for the purpose of enforcement. Should either of the parties decline this opportunity, Ms. Rodriguez-Freytas should be given the option to either: (1) cancel the settlement agreement and proceed toward an adjudication on the merits or (2) confirm the settlement agreement and forgo the attorney's fees awarded to her by the October 15th Order.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **VACATED AND REMANDED.**

FOR THE COURT:

Roseann B. MacKechnie,
Clerk of Court

By:

/s/ Lucille Carr
Lucille Carr, Deputy Clerk